

¹ 5 U.S.C. § 8101 *et seq.*

appellant's compensation.² The Board noted that OWCP had prepared a statement of accepted facts dated June 12, 1990, which accepted that "management was unresponsive in resolving problems in a civilized manner. The claimant experienced racial discrimination as the clerical [sic] harassed the claimant without intervention on the part of claimant's supervisor." It was also accepted that appellant was singled out for counseling, excluded from unit meetings and training assignments, given assignments not similar to other claim representatives, reprimanded in a loud voice on May 28, 1987 and worked with a supervisor who had little knowledge of relevant regulations and offered little technical assistance.

The Board noted a June 20, 2005 statement of accepted facts, provided to the second opinion psychiatrist Dr. Robert Hepps, found unsubstantiated the allegations of racial discrimination and being singled out for counseling, without further explanation. The Board found the June 20, 2005 statement of accepted facts did not provide an adequate background for development of the evidence. In addition, the Board indicated that, if OWCP was rescinding acceptance of certain compensable factors, it should issue an appropriate decision with specific findings.

In a memorandum dated January 28, 2009, OWCP indicated that factors of employment that had been considered compensable would be rescinded in an appropriate decision. It noted that the 2005 statement of accepted facts would be used for a second opinion evaluation. Appellant was referred to Dr. Alberto Lopez, a psychiatrist. In a report dated April 20, 2009, Dr. Lopez reviewed a history of injury and results on examination. He diagnosed depressive disorder. Dr. Lopez stated in pertinent part, "The condition related to employment, in my opinion, no longer exists. The condition was more than 20 years ago. In the meantime there have been many more serious problems, specifically the patient's many medical problems, the death of her brother in 1991, and the more recent diagnosis of bone marrow cancer. There is not any continuing relationship between the factors of employment and any degree of current depression which, in any event, is quite minor." Dr. Lopez stated that appellant was not precluded from returning to work from a psychiatric point of view, and any disability was due to her physical problems and age, rather than the employment-related condition.

In a notice of proposed termination dated March 11, 2010, OWCP reviewed the June 12, 1990 statement of accepted facts. It found that each of the factors discussed in the 1990 statement of accepted facts were not substantiated as a compensable work factor. With respect to an allegation of race discrimination, it found no evidence of record to substantiate the allegation. It did find that the factors described in the 2005 statement of accepted facts were compensable: (1) a clerk would not do tasks assigned by appellant and therefore appellant had difficulty completing her own tasks, (2) the clerk shook her finger in appellant's face, and (3) appellant's supervisor took no action with respect to the problems appellant encountered with the clerk. As to the medical evidence, OWCP found the weight of the evidence was represented by Dr. Lopez.

In a handwritten statement dated April 6, 2010, appellant contended that she still suffered from symptoms as a result of the treatment she received at work. She advised that she had no emotional problems prior to encountering a hostile work environment.

² Docket No. 07-429 (issued June 25, 2007).

By letter dated April 8, 2010, appellant's representative stated that there were other compensable work factors. He listed nine factors which he argued were compensable. The allegations not previously addressed included being singled out for an assignment that combined into one unit work that had previously been performed by two to four other employees, being given a detail in Watts where she trained employees and helped that office improve its statistical standing, and a supervisor allowing other employees to use appellant's personal identification number on input documents, and then charging her with their errors.

By decision dated April 20, 2010, OWCP finalized the termination and rescission of compensable work factors. It reviewed each of the allegations raised in the April 8, 2010 letter and found there were no additional compensable work factors.

Appellant requested a hearing before an OWCP hearing representative, which was held on October 7, 2010. On November 9, 2010 appellant submitted medical evidence. In a report dated October 8, 2010, a Dr. Robert Fusco indicated that appellant was upset over the termination of her compensation benefits. He diagnosed major depression, recurrent.

By decision dated December 23, 2010, an OWCP hearing representative affirmed the April 20, 2010 decision. The hearing representative found the weight of the evidence was represented by Dr. Lopez.

LEGAL PRECEDENT -- ISSUE 1

The Board has upheld OWCP's authority to reopen a claim at any time on its own motion under 5 U.S.C. § 8128 and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.³ The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.⁴ OWCP has the burden of proof to adjust or modify entitlement to compensation.⁵ In establishing that its prior acceptance was erroneous, OWCP is required to provide a clear explanation of its rationale for rescission.⁶

With respect to a claim based on harassment or discrimination, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.⁷ An employee's allegation that he or she was harassed or discriminated against is not determinative of whether or not discrimination occurred.⁸ It is well established that administrative or personnel matters, although generally related to employment, are primarily

³ *Eli Jacobs*, 32 ECAB 1147 (1981).

⁴ *Doris J. Wright*, 49 ECAB 230 (1997); *Shelby J. Rycroft*, 44 ECAB 795 (1993).

⁵ *See V.C.*, 59 ECAB 137 (2007).

⁶ *Belinda R. Darville*, 54 ECAB 656 (2003).

⁷ *Gregory N. Waite*, 46 ECAB 662 (1995); *Barbara J. Nicholson*, 45 ECAB 803 (1994).

⁸ *Helen P. Allen*, 47 ECAB 141 (1995).

administrative functions of the employer rather than duties of the employee.⁹ The Board has also found, however, that an administrative or personnel matter may be a factor of employment where the evidence discloses error or abuse by the employing establishment.¹⁰ In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹¹

ANALYSIS -- ISSUE 1

In this case, OWCP did not rescind acceptance of the claim itself, but rescinded acceptance of certain work factors that it had previously indicated were compensable work factors. It is important to clarify which incidents are compensable work factors under FECA, as medical evidence must be based on a proper understanding of the work factors that may be considered as contributing to an employment-related condition.

The March 11, 2010 notice and April 20, 2010 decision do provide a clear explanation as to why allegations that were found to be compensable in the 1990 statement of accepted facts are not supported by the evidence of record. In the March 11, 2010 notice of proposed termination, OWCP reviewed 12 specific allegations that had been included in the 1990 statement of accepted facts, including a claim of racial discrimination, being singled out for counseling, criticisms of management, administrative matters such as performance appraisals, disciplinary actions and exclusion from training assignments. As OWCP explained, none of these allegations are supported by probative evidence of record. Appellant had filed a complaint of discrimination based on race before the Equal Employment Opportunity Commission, but the only evidence of record found the allegations were not substantiated by the record. There was no probative evidence establishing error or abuse regarding any reprimands, performance appraisals or other administrative matters alleged. The Board finds no probative evidence to substantiate a compensable work factor with respect to the allegations discussed in the 1990 statement of accepted facts. OWCP properly rescinded acceptance of these factors and explained its findings.

OWCP did find that there were three compensable work factors, as noted in the 2005 statement of accepted facts. Appellant has not established any additional compensable work factors. The Board notes appellant raised additional allegations in an April 8, 2010 letter. There is an allegation of overwork, but this must be supported by the evidence of record.¹² Appellant did not submit any probative evidence establishing the allegation as compensable. There are additional allegations that are not accompanied by a detailed statement or evidence. For example, appellant alleged she was given a detail where she trained employees in 1984 and 1985, and the employing establishment improved its statistical standing. It is not clear whether appellant was alleging administrative error or how this contributed to an emotional condition, and no evidence was submitted substantiating a compensable work factor. She alleged error

⁹ *Anne L. Livermore*, 46 ECAB 425 (1995); *Richard J. Dube*, 42 ECAB 916 (1991).

¹⁰ *See Michael Thomas Plante*, 44 ECAB 510 (1993); *Kathleen D. Walker*, 42 ECAB 603 (1991).

¹¹ *Anna C. Leanza*, 48 ECAB 115 (1996).

¹² *Bobbie D. Daly*, 53 ECAB 691 (2002).

regarding use of PIN numbers, but did not provide a detailed discussion of this incident or evidence substantiating the allegation of error. The evidence of record did not establish any additional compensable work factors.

LEGAL PRECEDENT -- ISSUE 2

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, OWCP may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.¹³

ANALYSIS -- ISSUE 2

OWCP terminated compensation based on the report from the second opinion psychiatrist, Dr. Lopez. In his April 28, 2009 report, Dr. Lopez provided a history and reviewed the evidence of record. An important issue is whether he had an accurate background on which to base his opinion. As the Board noted in its prior decision, the 2005 statement of accepted facts was inadequate at that time, since OWCP had not explained the inconsistency between the 2005 and 1990 accepted facts in the case. The subsequent development of the case, as discussed above, indicated that the only accepted substantiated compensable work factors were the factors outlined in the 2005 statement of accepted facts: (1) a clerk would not do tasks assigned by appellant and therefore appellant had difficulty completing her own tasks, (2) the clerk shook her finger in appellant's face, and (3) appellant's supervisor took no action with respect to the problems appellant encountered with the clerk. The compensable factors were provided to Dr. Lopez and established a factual background regarding work factors. Dr. Lopez provided a rationalized medical opinion that appellant's employment-related condition had ceased. He noted the time elapsed from the exposure to the employment factors and the subsequent nonemployment-related physical conditions and psychological factors. Dr. Lopez provided a rationalized medical opinion based on a complete background.

The record does not contain a probative medical opinion establishing a continuing employment-related condition. The Board finds the weight of the evidence is represented by Dr. Lopez.

On appeal appellant argues that the rescission and termination of benefits was wrongful as OWCP waited 23 years and then reviewed the file in a manner that failed to provide him due process. It is well established that OWCP may review a case on its own motion,¹⁴ and in this case did provide appellant notice of termination and an opportunity to respond. Appellant stated that she was of advanced age and should not be brushed aside because OWCP lost or destroyed part of the record. There was no indication that any relevant evidence had been lost or destroyed. The record did not contain probative evidence with respect to the establishment of compensable work factors alleged by appellant. Appellant again stated that the factors listed in

¹³ *Elaine Sneed*, 56 ECAB 373 (2005); *Patricia A. Keller*, 45 ECAB 278 (1993); 20 C.F.R. § 10.503.

¹⁴ 5 U.S.C. § 8128(a).

the April 8, 2010 letter were compensable work factors, but as the Board noted above, no probative evidence was provided substantiating additional compensable work factors.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds OWCP properly rescinded acceptance of certain compensable work factors. The Board further finds OWCP met its burden of proof to terminate compensation as of April 20, 2010.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 23, 2010 is affirmed.

Issued: October 5, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board